No. 21,837

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HOD CARRIERS' AND CONSTRUCTION LABORERS' UNION, LOCAL NO. 300, AFL-CIO, RESPONDENT

On Petition for Enforcement of Orders of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 *et seq.*), for enforcement of an initial remedial order and a subsequent order fixing backpay, issued on February 11, 1964, and June 23, 1966, respectively,

against respondent, Hod Carriers' and Construction Laborers' Union, Local No. 300, AFL-CIO. The Board's Decisions and Orders (R. 24-25, 11-18 and 67-68, 34-57)[1] are reported in 145 NLRB 1674 and 159 NLRB No. 103. This Court has jurisdiction of these proceedings, the unfair labor practices having occurred at Los Angeles, California, within this judicial circuit.[2]

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[1] References to Volume I, containing the pleadings, the Board's decision and order, etc., are designated "R."; references to reproduced portions of the testimony as "Tr."; and to the parties' exhibits as "Ex." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The unfair labor practices involve employees of Desert Pipeline Construction Co., a California corporation, which is a member of Southern California Chapter of Associated General Contractors of America, herein called AGC. AGC negotiates collective-bargaining agreements on behalf of its members with labor organizations including Southern California District Council of Laborers and its members, including respondent. AGC members with their principal offices and places of business in the State of California, annually ship goods and perform services outside the State of California valued in aggregate in excess of $50,000. They also annually receive goods and services valued in excess of $50,000 directly from outside the State of California and from other California enterprises which annually receive goods and services valued in excess of $50,000 directly from outside the State of California (R. 12, 24; Tr. 8-9). On these admitted facts, the Board's jurisdiction is clear. *N.L.R.B.* v. *Hod Carriers, etc., Common Laborers' Union, Los Angeles Local 300,* 336 F. 2d 459 (C.A. 9), enf'g. *per curiam,* 128 NLRB 969, 971, 991; *Leonard* v. *N.L.R.B.*, 197 F. 2d 435, 436 n. 1 (C.A. 9); *Katz* v. *N.L.R.B.*, 196 F. 2d 411, 418 (C.A. 9).

STATEMENT OF THE CASE

I. The Board's Findings and Conclusions

The Board found in the initial unfair labor practice proceeding that the Local caused an employer to discharge its employees Murray and Dalton in violation of Section 8(a)(3) of the Act, thereby violating Section 8(b)(1)(A) and (2). In the subsequent backpay proceeding, the Board further found that Murray and Dalton are entitled to backpay—including fringe benefit payments to be made in their behalf—in the amounts of $1,658.06 and $78.41, respectively. The Board based its findings on the following facts:

A. *The Union causes Desert to lay off Murray and Dalton*

At all material times, the Union and Desert Pipeline Construction Co. were parties to a master labor contract and a memorandum of understanding (R. 12-13; R. Exs. 1, 2, Tr. 111-112).[3] This arrangement, which the Board found lawful, provided that Desert might bring into Local 300's area jurisdiction no more than three so-called "key men" to do laborers' work and would have to obtain any further needed labor from the Local (R. 13, 24; R. Ex. 1, Tr. 64, 31, 39). For 2 weeks prior to April 5, 1963, Desert, while laying gas pipe on streets and driveways in Los Angeles, had been operating with five laborers—namely, Rodriguez, Lopez, Gonzales, Dalton, and Murray—who were members of Local 507, a sister

[3] See note 2, *supra.*

local (R. 13, 24; Tr. 16, 17, 25-26, 46, 62, 84). Along with a welder and a truckdriver, all worked under Foreman Richardson (R. 13, 24; Tr. 19, 25, 55, 16, 28, 131).

On the morning of April 5, the crew was working at Rexford Drive when Joseph Young Murdock, assistant business manager of the Union, called at the jobsite. In answer to his inquiry as to the number of laborers on the job, Foreman Richardson told him there were five. Murdock walked over and spoke to each laborer and checked his dues record (R. 13, 24; Tr. 16-18, 47, 77, 113, 134). Murdock next turned to Richardson and said that he had seen a sixth laborer "run around the corner," but when Richardson denied this, Murdock added that the contract permitted only three "key men" (R. 13; Tr. 18-19, 27, 77, 113). He next told the five laborers to climb out of the holes in which they were working and the men did so (R. 13, 24; Tr. 19-20, 48, 77, 114, 120). Gonzales asked Murdock why the job was shut down and Murdock replied by telling him to go over, and sit down, and shut up (R. 13, 24; Tr. 78, 86). Murray then asked Murdock the same question and Murdock told him the same thing. Murray, however, told Murdock that he had the right to shut the job down, but not to tell him to go over, sit down, and shut up, and when Murdock repeated his direction, adding the appellation, "boy", Murray protested that he was not a boy. Murdock then told Murray he had better go over and sit down before Murdock "whittled him down to size" (R. 13, 24; Tr. 79, 98-99). A heated argument lasting 2 or 3 minutes followed, the men

"had a nose-to-nose talk there for a bit" and Murray told Murdock, "I would fight him with words or fists" (R. 13 n. 6, 24; Tr. 48, 79, 124, 132-133).[4] Dalton, who had been across the street and 60 feet away talking to a householder, now came over. He urged Murray not to argue, lest he get them all into trouble, and Murray thereupon turned away and walked off with Dalton. Murdock remained standing there, angry (R. 13 n. 6, 24; Tr. 48-49, 79-80, 134).

A few minutes later, Murdock telephoned Desert's president and general manager, Floyd Smith. Murdock told Smith that an improper number of key men were on the job, and that his foreman had not been cooperative in the matter. He also complained that Murray and Dalton had been uncooperative and that he had had trouble with Dalton on a prior job (R. 13; Tr. 22, 117-118, 145-146, 150, 159, 162, 165). Murdock added that both Murray and Dalton had been disrespectful or abusive or uncooperative and that "these two men had to go" (R. 13-14, 24; Tr. 150, 148, 151, 158, 162). Smith asked Murdock to go back to the jobsite and speak to Richardson (Tr. 118). He also called Richardson by radiotelephone and told him to see what he could work out with Murdock (R. 14, 24 n. 7; Tr. 21-22).

Murdock went back to the jobsite and told welder Rudy Chavez, Richardson's leadman, "You can have three men according to the agreement, and you can

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[4] Murdock, 48 years old, 6 feet 1½ inches tall, and weighing 225 pounds, is a former amateur boxer; Murray, 5 feet 10½ inches tall, weighs 185 pounds (Tr. 95, 131-132, 142).

put on three men according to the agreement, except Murray and Dalton (R. 14, 24; Tr. 80-81, 89).

A short time later, while the job was still shut down pursuant to his instructions and the crew stood around listening, Murdock told Richardson that he could have only 3 laborers from Local 507 (R. 14, 24; Tr. 23-24, 52, 66, 81-82, 120, 122). Richardson, in accordance with his regular practice, said he would like to keep those with most seniority, and named Lopez, Gonzales, and Dalton—the men who in fact had the greater seniority (R. 14, 24; Tr. 24, 40, 52, 56-57, 82, 121-122, 127, 203-204, 261, 265, 268-269, G.C. Exs. 3D p. 2, 3E p. 2, 3B p. 2, 3A p. 2, 3C p. 2). Murdock replied that he would not let the job resume "under those conditions." Richardson asked what conditions he required, and Murdock explained that the work could go on only "as long as Dalton and Murray are not working" (R. 14, 24; Tr. 24, 41, 51-52, 57, 71, 82).

During his conversation with Richardson, Murdock claimed that Dalton had called him a name while Dalton was talking to the householder on the other side of the street (R. 14 n. 9, 24; Tr. 54, 58-60, 73-74). He also said that he had had trouble with Dalton on a job in Venice, California, 4 years before (R. 14 n. 9, 24; Tr. 54, 58). Dalton told Murdock that he had never had trouble with him in Venice 4 years before, and that he had not been working in Venice at that time. He further denied Murdock's claim that he had called him a name on that day or at any other time. Murdock made no reply (R. 14,

24; Tr. 54, 68).[5] Richardson dismissed Dalton and Murray and the job resumed about an hour after the shutdown, with Lopez, Gonzales, and Rodriguez continuing at work (R. 14, 24; Tr. 24, 30, 38, 52-53, 66, 121, 127, 154).

The Board found that although Murdock lawfully demanded that Desert discharge two employees, the selection of Murray and Dalton was the result of Murdock's demand that *they*—rather than any other men—be discharged or the job would be shut down. The Board further found (R. 14, 24) that Murdock was angry at Murray because of the argument —which began when Murray asked why he was being told to stop work—and was angry at Dalton because he sided with Murray, because Murdock believed he had had "trouble" with Dalton on another job several years before, and because he believed Dalton had called him a name. Accordingly, the Board found that under the circumstances here, the Union's demand for their discharge violated Section 8(b)(2) and (1)(A) of the Act.

B. *The events after the layoffs*

On April 10, 1963, 5 days after Murdock's visit, Rodriguez, one of the retained key men, transferred from Local 507 into the Union (R. 41, 68; Tr. 275). This left only two imported laborers on Richardson's crew and Richardson was free to hire a third imported man under the memorandum of understand-

[5] The Board credited Dalton's testimony that Murdock's accusations were in fact false (R. 14, 24; Tr. 54, 61).

ing. On the same day that Rodriguez transferred into Local 300, Dalton was rehired by Desert and resumed his post as a laborer on Richardson's crew at the Rexford Drive project (R. 41, 68; Tr. 358, G.C. Ex. 4A). He was without work during the 5-day interim (R. 41, 49, 68; Tr. 217-219).

On April 9, Murray registered for work with Local 507 in which he held membership (R. 41, 68; Tr. 286, 297, 360). On April 11, he transferred his membership into Local 300 and registered with it for work (R. 41, 68; Tr. 286, 290, 297, 299, 303, 359, G.C. Ex. 5). At the time of transfer into the Union, he told Renteria Manuel, Local 300's secretary-treasurer, that he needed a job clearance and Manuel told him to go "upstairs" to see another union representative for this purpose (R. 41, 68; Tr. 287). Murray went upstairs, passed through a secretary's office and reached the office of the "head man" whom he was to see, namely, Ray Waters, the Local's business manager (R. 41-42, 68; Tr. 287-289, 303-304, 351).[6] Murray told Waters that he wished a job clearance for the Rexford Drive project and Waters replied that Murray would have to present a written request for dispatch, signed by Desert's superintendent and designating him by name (R. 41-42, 68; Tr. 288).

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[6] Murray recalled speaking upstairs to a "Spanish [looking] fellow" whose name he could not recall. However, the Board found that he had confused Ray Waters with one "Lupe" who had signed his membership book at the time of the transfer. The Board noted that the only office "upstairs" which one passed through a secretary's anteroom in order to reach was that of Waters (R. 41-42, 68; Tr. 287-290, 303-304, 351-353, G.C. Ex. 5).

Waters' instructions to Murray were pursuant to the master labor contract, which requires Local 300 to maintain a nondiscriminatory "employment facility" from which it shall dispatch qualified and competent registrants for work to meet contractors' requests (R. 46, 68; G.C. Ex. 2, pp. 608-609, Art. II D 5-7). The contract further provides (R. 46, 68; G.C. Ex. 2, p. 609, Art. II D 7) that

> . . . The order of preference in the dispatchment of applicants for employment is as follows:
>
> Group A: Applicants whom a Contractor requests by name who have been laid off or terminated from employment of the type covered by this agreement and in the area served by the employment facility within 270 days before a request from the same Contractor who laid off or terminated them, provided they are available for employment.

* * * *

Murray obtained such a written request from Company Superintendent John Roberts, returned to the Union hall, and handed it to Waters (R. 42, 68; Tr. 62, 78-79, 288). While Waters was reading the request, Murdock, who had a desk in another office nearby, came into Waters' office, took Waters to a distant corner of the room, and spoke to him briefly while both glanced over at Murray. After this, both returned and Waters told Murray he "couldn't have" the job clearance (R. 42, 46, 68; Tr. 288, 253).

Murray renewed his registration for work each week thereafter and responded to weekly rollcalls of

registered men (R. 43; Tr. 277-279, 322). Since almost 400 men had registered before him, his number was never reached (R. 43; Tr. 278). During the week ending April 21, 1963, Murray returned to work with Desert, but without the Union's job clearance (R. 42; Tr. 291, 277-278, 280-281, G.C. Ex. 3A p. 1). He was assigned to Foreman Buford Lilly's pipeline crew. About 2 or 3 days later, while Murray was at work, "Jitterbug" Jackson, a business agent for Local 300, came up to Murray, stated that he was the Local's business agent, exhibited his union identification card, and asked, "You're Murray, aren't you?" When Murray said he was, Jackson asked to see his union membership book (R. 43, 68; Tr. 292-293, 319-321, 367; G.C. Ex. 3A p. 1).[7] Jackson did not ask Murray to show a job clearance or referral (R. 43; Tr. 300, 301). After verifying Murray's identity, Jackson told Lilly to lay Murray off. Lilly replied that if Jackson wanted Murray off the job, Jackson would have to tell Murray to get off (R. 43, 68; Tr. 292, 293, 320-321). Jackson then declared that if Lilly failed to lay off Murray, he would shut the job down. When Lilly persisted in his refusal and Jackson repeated his threat, Murray intervened. He asked whether Jackson would permit the job to con-

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[7] Murray's fellow workmen identified the one who had exhibited his union credentials as "Bee Pop or Ditty Pop or something like that" and it is conceded that the Union employed a business agent known as "Jitterbug Jackson" at the time. The Board inferred, from the allusion to popular dance music common to both nicknames, that it was Jackson who figured in this incident (R. 43, 68; Tr. 321, 367).

tinue if he left, and upon Jackson's saying yes, quit the jobsite (R. 43, 68; Tr. 293).

Between April 28, 1963, and February 12, 1964, Murray got jobs elsewhere (R. 44, 68; Tr. 217-219, 293-294; G.C. Ex. 1(b) p. 3).[8] On February 12, 1964, Desert again hired him as a laborer and he worked for Desert and its parent corporation and successor, Cabildo Corporation, more or less regularly thereafter (R. 44, 68; Tr. 180-181, 205-206, 217-219; G.C. Ex. 1(b) p. 4; G.C. 3A p. 2).

C. *The backpay computations*

The correctness of the Board's arithmetical calculations, discussed below, is not in dispute. The Union has not yet notified the employer, however, in the form which the Board's order requires, that it has withdrawn its objections to the continued employment of Murray and Dalton, nor has it complied with the Board's requirement that it request that they be rehired (R. 16, 17, 24, 49, 68; G.C. Ex. 1(b), par. C). Determination of the Union's backpay obligation for all periods after March 31, 1965, has therefore been reserved (R. 49, 68; G.C. Ex. 1(b) p. 1 Par. A).

The parties had stipulated the correctness of the record basis and arithmetical calculations upon which the General Counsel's backpay specification was based. The Board found, however, that the specification alleged a cognizable time loss of 7½ hours for Dalton on April 5, whereas he actually lost only 6½

[8] References to G.C. Ex. 1(b) are solely to the backpay specification, submitted as an exhibit during the backpay proceeding.

hours' work that day (R. 49, 68). As noted, Dalton, discriminatorily laid off on April 5, 1963, was rehired April 10 and had no interim work or earnings (p. 8). In determining his gross earnings loss for this period, the Board found that the statutory purposes would be served by the conventional formula of multiplying his hourly pay rate by the number of hours of work he lost (R. 49, 68).

With respect to Murray, the Board found (R. 44, 68) that since Foreman Richardson selected him for layoff in order to comply with the contract obligation permitting only three key men to be retained, Murray initially suffered no actual loss as a result of the Union's discriminatorily motivated selection of Murray and Dalton as the persons to be laid off. The Board further found, however, that when for the same discriminatory reasons the Union prevented Murray's returning to work after he transferred his membership and became eligible for referral, it caused him loss of wages for which it was accountable. As stated (p. 8), Murray transferred into the Union on April 11, thereby becoming qualified on that day for preferential dispatch to his former job. On the assumption that Desert would have directed him to report for work the following morning had the Union dispatched him that day as requested, the Board found that backpay losses, in his case, should be computed from April 12 (R. 50, 68).[9]

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[9] Murray first began working for Desert in June 1962. By January 1963 he acquired enough seniority to be receiving practically steady work with Foreman Richardson's crew (R. 38, 68; Tr. 203-204, 355-357; G.C. Exs. 2, 3A p. 1), and

The Board adopted the General Counsel's general formula, set forth in the backpay computation (R. 50, 68, G.C. Ex. 1(b) pp. 2-3, Tr. 234-235), whereunder the measure of Murray's quarterly gross earnings during the backpay period was generally the hours worked quarterly by Rudolfo P. Gonzales, a laborer on Desert's Rexford Drive pipeline project. Since Gonzales did not work full time during the third quarter of 1963, however, the Board used the hours worked in that quarter by Raymond D. Lopez, another laborer on the project (R. 50-51, 68).[10]

In using the respective number of hours worked by Gonzales and Lopez as the measure of Murray's losses, the Board noted that the laborers each received the same benefits (R. 50, 68; G.C. Ex. 1(b) par. G, 102, R. Ex. 2, pp. 634-635 Art. XV D. E.). In addition, their respective classifications as laborers and pneumatic tool operators are routinely interchangeable in that the workers work comparable hours and

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as noted *supra,* once the Union's direct intervention ceased, he resumed such work.

[10] Because of the General Counsel's misapprehension that five laborers were receiving the same pay rate, the backpay specification sought to use the quarterly earnings of Gonzales and Lopez, respectively, as the specific measure of gross backpay. The Board found, however, that Murray, classified as a laborer when discriminatorily laid off, was being paid $3.26 per hour under the contract, while Ganzales and Lopez, classified as pneumatic tool operators, received $3.47 (R. 50, 68; R. Ex. 2, p. 635; Tr. 231-232, G. C. Ex. 4A). The Board recomputed accordingly, further making due allowance for the fact that the contract rate for laborers increased from $3.26 to $3.36 per hour on May 1, 1963 (R. 51-52, 68, R. Ex. 2, p. 635).

perform similar tasks. Workers performing tasks within both classifications are paid the higher contractual rate, set for pneumatic tool operators, if they spend more than a specified minimum time working within the classification designated (R. 51, 68; Tr. 233, 281-282, 358). Murray had worked as a pneumatic tool operator for Desert before his discharge (R. 39, 68; Tr. 295, 318, 358).

II. The Board's Order

In its original, remedial order (R. 16-18, 25), the Board directed that the Union cease and desist from causing or attempting to cause Desert to discriminate against employees in violation of Section 8(a)(3) of the Act; or in any other manner restraining or coercing employees in the exercise of their statutory rights. Affirmatively, the Board required the Union to make the two employees whole, to notify them and Desert that it has no objection to their employment, to request Desert to rehire them, and to post the customary notices.

In its backpay order (R. 24, 68), the Board ordered that the Union make whole Dalton and Murray by payments to them directly of net backpay, and payments on their behalf to fringe benefit funds, with interest, as of March 31, 1965, as follows:

Discriminatee	Net Backpay	Health and Welfare Fund	Joint Pension Trust Fund
Philip J. Dalton	$ 73.55	$ 2.81	$ 2.25
Dennis R. Murray	1,336.07	179.44	143.55

ARGUMENT

I. Substantial Evidence on the Whole Record Supports the Board's Finding That the Union Violated Section 8(b)(2) and (1)(A) of the Act by Causing Desert to Discriminate Against Dalton and Murray

A union and an employer may, of course, lawfully agree to an exclusive hiring hall, requiring an applicant for employment to obtain union clearance as a condition to employment, provided that the hiring hall is operated on a nondiscriminatory basis.[11] As a necessary corollary to this right, the union may lawfully refuse referral, or seek the discharge of an employee who has been employed in violation of the agreement, despite the general prohibitions of Section 8(b)(2) and (1)(A) of the Act. "However, if the union's action, directed to an employer, was intended to discipline an individual . . . for violation of union rules, or to encourage individuals to accept the authority of union officers, . . . such action constitutes an unfair labor practice. . . ." *Lummus Co.* v. *N.L.R.B.*, 339 F. 2d 728, 733-735 (C.A. D.C.) (footnotes omitted). Accord: *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17, 25-26, 40-42 (Congress, by enacting Section 8(b)(2) and (1)(A) sought to prevent an employer from being "obliged to discharge an employee because the union does not like him.") See, *N.L.R.B.* v. *United Brotherhood of Carpenters & Joiners of America, Local 1281*, 369 F. 2d 684 (C.A. 9), en-

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[11] *Local 357, International Brotherhood of Teamsters* v. *N.L.R.B.*, 365 U.S. 667; *N.L.R.B.* v. *International Union of Operating Engineers Local 12*, 323 F. 2d 545 (C.A. 9).

forcing 152 NLRB 629; *N.L.R.B.* v. *International Brotherhood of Electrical Workers, Local Union 340*, 301 F. 2d 824, 825 (C.A. 9); *N.L.R.B.* v. *I.A.M. District Lodge 727*, 279 F. 2d 761, 765-766 (C.A. 9), cert. denied, 364 U.S. 890; *N.L.R.B.* v. *Reed*, 206 F. 2d 184, 189 (C.A. 9). As we show below, Murdock's conduct had such an unlawful object.

As shown in the Statement, Desert was ready to comply with the Union's demand that it honor its agreement and lay off two of the five nonmembers of the Local whom it had brought into the area and proposed to keep those with greatest seniority—Dalton, Lopez and Gonzales. A reduction of the crew to three key men was all that Local 300 was lawfully entitled to ask, however, but Murdock, the Union's assistant business manager, did more than demand compliance with the agreement. He had already called a walkout. Now, under threat of keeping the job shut down, he maintained a demand, made first to Company President Smith, then to Chavez (assistant to Foreman Richardson), and finally to Richardson himself, that Desert, in making its choice of those to discharge, could "put on three men according to the agreement, except Murray and Dalton;" these two "had to go," and the job might resume only "as long as Dalton and Murray are not working" (*supra*, p. 6). To get the work going again, Desert yielded; it discharged both Murray and Dalton. Desert, if free to do so on a nondiscriminatory basis, would have selected Murray, but not Dalton, for separation. The record makes evident, however, as the Board

found (R. 14-15, 24), that the Union compelled the selection.[12] In addition, the Board properly found that Murdock caused them to be the ones discharged because of his animus against them; he deemed them "disrespectful, uncooperative and abusive" principally because they did not promptly quit work, "go over, sit down, and shut up" (R. 14-15, 24). It followed that their discharges, which necessarily served to coerce "compliance with union obligations or practices," with resultant encouragement of union membership, were not privileged under the Act but unlawfully discriminatory.

On these facts, it is no defense to the Union that Desert, if freely releasing two employees, would have discharged Murray. Granted that the unchallenged agreement required two key men to be terminated, that the employer wished to hold those with greatest seniority, and that Murray would not have quali-

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[12] Although Murdock denied demanding that Desert discharge these two men, the Board and its Trial Examiner found otherwise, withholding credence from Murdock wherever other witnesses substantially contradicted his testimony. As the Trial Examiner explained (R. 12 n. 1), Murdock was evasive and failed to give responsive answers to relatively simple and direct questions (see, for example, Tr. 126, 135, 139-140, 165-166); in addition, he contradicted himself on material matters and appeared to be seeking to help the Union's cause without regard to truth (see, for example, Tr. 125-126, 138-140, 163, 165-166). As this Court has noted, "The matter of the credibility of the witnesses is a function of the trial examiner and the Board." *N.L.R.B.* v. *Gorlick*, 364 F. 2d 508 (C.A. 9); accord, *N.L.R.B.* v. *Local 776 IATSE (Film Editors)*, 303 F. 2d 513, 518 (C.A. 9); *N.L.R.B.* v. *IBEW, Local 340 (Walsh Construction Co.)*, 301 F. 2d 824, 827-828 (C.A. 9).

fied under such a standard, we submit as applicable here a principle which this Court has voiced repeatedly: "The existence of some justifiable ground for discharge is no defense if it is not the moving cause." *Wells, Incorporated* v. *N.L.R.B.*, 162 F. 2d 457, 460 (C.A. 9); *N.L.R.B.* v. *Lewis*, 246 F. 2d 886, 890 (C.A. 9); *N.L.R.B.* v. *Texas Independent Oil Company, Inc.*, 232 F. 2d 447, 450 (C.A. 9); *Boeing Airplane Co.* v. *N.L.R.B.*, 217 F. 2d 369, 374 (C.A. 9). Since the lawful basis *cannot* explain the discharge of Dalton, who had sufficient seniority to be retained, the Board was clearly warranted in concluding that Murray was also selected for unlawful reasons. The Board required (*infra*, p. 18), however, that in determining the amount of backpay, the fact that Murray would have been released under nondiscriminatory reduction-in-force standards should be considered, thus precluding any prejudice to the Local.

II. The Board Properly Determined the Amounts of Backpay Due Dalton and Murray

A. *The Union caused both employees to suffer wage losses for which it should make them whole*

Local 300 unlawfully caused Desert to lay off Dalton while steadily at work on a project which he rejoined the following week, and the amount of his loss in wages and fringe benefits could be determined on the conventional basis of the number of hours of work the Union made him lose. *N.L.R.B.* v. *Ellis and Watts Products, Inc.*, 344 F. 2d 67, 68 (C.A. 6). The Local also unlawfully caused Murray's dis-

charge on April 5, 1963, but he suffered no cognizable pay loss at that time since, in any event, lack of seniority would have properly led to his selection. The Union did cause cognizable pay losses after April 11, when Murray, now a member of Local 300, sought return to his regular job by presenting a written request from Desert's superintendent for his preferential dispatch, but the Local refused him clearance. Thereafter, Murray registered and reported weekly at the union hall without result and later returned to work with Desert without clearance, until the Union again wrongfully kept him from working. Its business agent, "Jitterbug" Jackson, came to the jobsite for the express purpose of making his foreman lay him off and forced him from the job by threat of a walkout (*supra*, pp. 10-11). During the next 8½ months Murray found work elsewhere before returning to regular work with Desert.

The impropriety of the Union's withholding the requested job clearance from Murray is readily demonstrable. Under the master agreement (*supra*, p. 9) providing for the Local's hiring hall, Murray was entitled to preference as an applicant "whom a Contractor requests by name who [had] been laid off [by the requesting contractor] within 270 days before [the] request." The Union contends, however, that although the contract speaks of work "within 270 calendar days" of the request, the parties to the master agreement have long understood and applied the foregoing contractual provision so that workers should receive preferential dispatch only when they

had *worked* "270 calendar days" within the area served and with the specific contractor who had laid them off and currently sought their dispatch. A number of factors support the Board's rejection of this contention, which it found to be no more than an afterthought.

Thus, when Murray asked for a preferential dispatch, Ray Waters, the Union's business manager, told him only that he had to get a written request from Desert's superintendent; he mentioned no additional condition (R. 46-47, 68; Tr. 288, 327). Nor did Waters say anything about Murray's work record with Desert when, upon Murray's due presentation of the required written request from Superintendent Roberts, he refused to grant clearance (R. 47, 68; Tr. 288, 324). Also, as the Board found (R. 47, 68), the relevant contract provision:

> simply will not . . . bear the construction which respondent Union's counsel presently propounds. Clearly, Group A preference in dispatch must be granted applicants who have been laid off or terminated *within 270 Calendar days* before the contractor responsible for their layoff or temination proffers a written request for their referral. Counsel's argument that contractual dispatch, rather, may be granted only workers *laid off or terminated following 270 calendar days spent working* for such a contractor—makes no sense. [Emphasis in original.]

For as the Board observed (R. 47), employees do not ordinarily work every calendar day and a provision which referred to "270 calendar days spent

working" would be surprisingly inappropriate in such a context—that is, it could be interpreted literally to require work on holidays, or loosely to read "working days" for "calendar days," creating a problem as to what limitations, if any, existed as to the time in which such work had to be performed. The Union failed, however, to state which possible construction it claimed was proper, or to provide any standard to resolve the inescapable ambiguity resulting from its contention. The Trial Examiner offered to reopen the record, if necessary, to receive documentation which Union counsel claimed would show such an interpretation of the clause either by arbitrators or the Joint Board of the Building Trades. Union counsel promised to append copies of such decisions to his brief, but the promise was not made good (R. 47; Tr. 374-375). Actually, as the Board noted, the contractual provision is an obvious restatement of an earlier provision in hiring-hall contracts to which Local 300 was a party and which, consonant with the Board's interpretation here, provided that employees first to be referred should be those "recently laid off" by contractors in the area who "now desire to reemploy the same workmen," regardless of their work history. *Petersen Construction Corp.*, 128 NLRB 969, 992 (1960), enf'd 336 F. 2d 459 (C.A. 9); *Mason Contractors Exchange of Southern California*, 132 NLRB 839, 841 (1961).[13]

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[13] A contractual provision identical with the one in the case at bar was involved in *Hod Carriers' Building etc., Union, Local 652 (Earl C. Worley)* (1964), 147 NLRB 380, 384-

B. *The Board used a proper formula in fixing the amount of Murray's wage losses*

In its "wide discretion" to effect "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination," (*Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194, 199), the Board resorted to a formula in which it took as the measure of Murray's quarterly gross earnings during the backpay period, the number of hours worked by Gonzales, his fellow laborer on the Rexford Drive project, except for the third quarter of 1963 during which Gonzales did not work full time. As to that quarter, the Board used the hours of Lopez, another laborer on that project. In using this basis for its computation, the Board reasonably gave weight to the fact that the five men on the crew received the same benefits, held routinely interchangeable classifications, worked comparable hours and performed similar tasks. Although Murray was classified as a laborer while the other two were rated pneumatic tool operators at the time of the April 5 layoff, this was only true of the particu-

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385, enf'd 351 F. 2d 151 (C.A. 9). There, the business representative of a sister local of the Union told both an employee who had worked no more than 146 days for his current employer, and the employer himself, that if the employee signed the out-of-work list at the union hall and the employer wished his services, the employer could request the employee by name and the sister local forthwith would give him clearance. The business agent, in construing the contractual provision, did not depart from its plain language or import any length of work history such as that for which Local 300 now contends.

lar job; Murray had worked for Desert in the other classification also (*supra*, p. 14).

The Board's approach was "as close approximation as the circumstances permit[ted]." *Marlin-Rockwell Corp.* v. *N.L.R.B.*, 133 F. 2d 258, 260 (C.A. 2). Compare *N.L.R.B.* v. *Kartarik, Inc.*, 227 F. 2d 190, 191 (C.A. 8) ("the same amounts of wages as respondent had paid to other comparable employees during the period involved"); *N.L.R.B.* v. *Int'l Assn. of Heat & Frost Insulators*, 261 F. 2d 347, 350 (C.A. 1) ("the standard of what union journeymen had earned"). Accordingly, the Board's approach has a reasonable basis and is entitled to judicial affirmance. As the Eighth Circuit pointed out in *N.L.R.B.* v. *Brown & Root*, 311 F. 2d 447, 453, "Obviously, in many cases it is difficult for the Board to determine precisely the amount of back pay which should be awarded to an employee. In such circumstances, the Board may use as close approximations as possible, and may adopt formulas reasonably designed to produce such approximations. . . . [W]ith respect to the formula for arriving at backpay rates or amounts which the Board may deem necessary to devise in a particular situation, [judicial] inquiry may ordinarily go no further than to be satisfied that the method selected can not be declared to be arbitrary or unreasonable in the circumstances involved." Accord: *N.L.R.B.* v. *Local 138, Operating Engineers*, —— F. 2d —— (C.A. 2, No. 319, June 29, 1967, 65 LRRM 2938). Cf. *N.L.R.B.* v. *Deena Artware, Inc.*,

228 F. 2d 871, 872 (C.A. 6).[14] Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a reasoned conclusion. *Palmer* v. *Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 561." *N.L.R.B.* v. *Kartarik, Inc.*, 227 F. 2d 190, 193 (C.A. 8). Accord: *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 562.

C. *The Board properly overruled the Union's defenses*

Before the Board, the Union contended that it was improper to hold backpay proceedings before entry of a judicial decree confirming its findings of statutory violation and enforcing its initial remedial order. While the Board has often followed that course (*Nathanson* v. *N.L.R.B.*, 344 U.S. 25, 29), there is no statutory requirement that the Board must defer backpay proceedings until a court has enforced the basic remedial order. The Act in no way purports to specify the proceedings which the Board shall institute so as to determine amounts of backpay due under its remedial orders. Section 10(c), the only portion of the Act making specific mention of backpay, provides, in relevant part, only that the Board, if finding that an unfair labor practice has been committed, shall state its findings of fact and order the repondent to cease and desist from the unfair labor practice found:

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[14] The Board's resulting order may not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 216.

> and to take such affirmative action, including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: . . .

Not only does the Act omit to prescribe the Board's procedure in regard to backpay, but by Section 10 (d), it goes a step further and affirmatively authorizes the Board:

> Until a transcript of the record in a case shall have been filed in a court, . . . *in such manner as it may deem proper* [*to*] *modify* . . . , in whole or in part, any . . . order made or issued by it.

In addition, Section 6 accords the Board "authority . . . to make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," and the Board, by Section 102.52 of its Rules and Regulations, Series 8, as amended, permits a regional director, in his discretion, to initiate backpay proceedings "After the entry of a Board order directing the payment of backpay or the entry of a court decree enforcing such a Board order, ..." Thus, in instituting the backpay proceeding prior to enforcement of its earlier order, the Board acted in full accord with its statutory authority. It used its "wide discretion to keep the present matter within reasonable bounds through flexible procedural devices." *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 199. Significantly, the Union neither cited judicial authority for its position, nor indicated how it was prejudiced by the Board's procedure.

Contrary to the Union's contention, the General Counsel was under no duty to allege, or prove as a

condition precedent to a backpay determination, that Dalton and Murray duly sought to mitigate their pay losses by registration and other efforts to find work. Rather, this is a matter which was part of the Union's affirmative defense. The Union had caused an employer to discriminate against employees and thereby came under a requirement to remedy its unfair labor practice. It was in much the same position as a conventional tortfeasor: Damage by its wrongful action having been shown, the burden to allege and show facts in diminution rests on the wrongdoer, including such matters as due search for work. The rule is unquestioned. *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 198-200; *N.L.R.B.* v. *J. G. Boswell Co.*, 136 F. 2d 585, 595 (C.A. 9); *Fisher Construction Co.* v. *Lerche*, 232 F. 2d 508, 509 (C.A. 9); *Lozano Enterprises*, 152 N.L.R.B. 258, 262, enf'd. 356 F. 2d 483 (C.A. 9).[15] And see *Snow* v. *N.L.R.B.*, 308 F. 2d 687, 695 (C.A. 9). Actually, the Union makes no claim that either Murray or Dalton failed to use due diligence in finding work during the backpay period, and the contrary clearly appears.

Finally, the Union contended that the Board did not have jurisdiction over the unfair labor practice because Murray failed to exhaust his contract reme-

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[15] Accord: *N.L.R.B.* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 175, 178-179 (C.A. 2), cert. denied, 384 U.S. 972; *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 130 F. 2d 765, 768 (C.A. 1) (on contempt); *Nabors* v. *N.L.R.B.*, 323 F. 2d 686, 690 (C.A. 5), cert. denied, 376 U.S. 911; *N.L.R.B.* v. *Ellis and Watts Products Co.*, 344 F. 2d 67, 69 (C.A. 6); *N.L.R.B.* v. *Brown & Root, Inc.*, 311 F. 2d 447, 454 (C.A. 8).

dies. The Local relies on Article V of the master agreement which provides that grievances shall be reported by the Union's job steward to its business agent for an initial effort by the business agent for adjustment of the dispute with the contractor (R. Exh. 2, pp. 615, *et seq.*). The Article further provides:

> If the grievance or dispute is not satisfactorily adjusted by the business agent and the Contractor or his representative, either *party* may refer the matter of the Joint Adjustment Board, provided that the *Union* and the *Contractor*, or his *representative*, have met at least once in an effort to settle the grievance or dispute. [Emphasis supplied.]

Of course, as an exercise of discretion, the Board will defer to existing arbitration awards in appropriate cases. See *Hawkins* v. *N.L.R.B.*, 358 F. 2d 281, 284 (C.A. 7); *Ramsey* v. *N.L.R.B.*, 327 F. 2d 784, 787-788 (C.A. 7), cert. denied, 377 U.S. 1003; *Lodge 743, International Association of Machinists* v. *United Aircraft Corp.*, 337 F. 2d 5, 11 (C.A. 2). Murray was not a *party* to the contract, however, and his right to pursue a grievance against the Union to arbitration is questionable. See *Black-Clawson Co.* v. *I.A.M. Lodge 355*, 313 F. 2d 179, 183-184 (C.A. 2). Assuming, however, that such access was open, that Murray knew this, and that the Joint Adjustment Board, with its Union representation, was "such an impartial tribunal as would justify [the Board's] deference to it" (*Lummus Co.* v. *N.L.R.B.*, 339 F. 2d 728, 733 (C.A. D.C.), it is well settled that

the mere existence of the unexercised right to arbitration concerning conduct which is both a breach of a contract and an unfair labor practice does not deprive the Board of jurisdiction, for in such case there is "violation of a duty not only prescribed by the contract but also imposed directly by the Act, disregard of which would constitute an unfair labor practice." *Square D Co.* v. *N.L.R.B.*, 332 F. 2d 360, 364 (C.A. 9). Accord: *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432, 436-437; *N.L.R.B.* v. *C. & C. Plywood Co.*, 385 U.S. 421, 428. *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 270; *N.L.R.B.* v. *Walt Disney Productions*, 146 F. 2d 44, 48 (C.A. 9), cert. denied, 324 U.S. 877.[16]

[16] The Union's reliance on *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 is misplaced. *Maddox* dealt with the right of an employee to sue the *employer* directly under a collective-bargaining agreement subject to Sec. 301(a) of the Act. As noted above, the union, rather than the employee, is the signatory party to the contract. *Maddox* merely holds that, accordingly, "the employee must afford the union the opportunity to act on his behalf, . . . [since such] activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in continuing administration of the contract. . . ." Thus, *Maddox* is clearly inapplicable to an employee's right to bring unfair labor practice charges, a right conferred by the Act itself.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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August 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX A

Pursuant to Rule 18(f) of the Rules of Court (Numerals refer to pages of the stenographic transcript)

Original unfair labor practice hearing—July 29, 1963

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in evidence
1-A - 1-H	7	7	7

RESPONDENT'S EXHIBITS

1	107	107	107
2	109	110	110

Backpay proceeding—July 27 and August 2, 1965

GENERAL COUNSEL'S EXHIBITS

1(a) - 1(h)	179	179	179
2	180	180	181
3(a) - 3(e)	200-201	202	203
4(a) - 4(b)	204-205	205	205
5	290	291	291

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a). It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * * *

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation

of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order,

nd shall file in the court the record in the proceedngs, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX C

Sec. 102.52 of the Rules and Regulations of the National Labor Relations Board, Series 8 as amended, effective March 15, 1962, provides in relevant part as follows:

Sec. 102.52 *Initiation of proceedings; issuance of backpay specification; issuance of notice of hearing without backpay specification.*—After the entry of a Board order directing the payment of backpay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a respondent concerning the amount of backpay due which cannot be resolved without a formal proceeding, the regional director may issue and serve upon all parties a backpay specification in the name of the Board. * * * *

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